

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

MICHAEL K. KELLOGG  
PETER W. HUBER  
MARK C. HANSEN  
K. CHRIS TODD  
MARK L. EVANS  
STEVEN F. BENZ  
NEIL M. GORSUCH  
GEOFFREY M. KLINEBERG  
REID M. FIGEL

SUMNER SQUARE  
1615 M STREET, N.W.  
SUITE 400  
WASHINGTON, D.C. 20036-3209  
  
(202) 326-7900  
  
FACSIMILE:  
(202) 326-7999

HENK BRANDS  
SEAN A. LEV  
EVAN T. LEO  
ANTONIA M. APPS  
MICHAEL J. GUZMAN  
AARON M. PANNER  
DAVID E. ROSS  
SILVIJA A. STRIKIS  
RICHARD H. STERN, OF COUNSEL

March 19, 2001

VIA HAND DELIVERY

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Room TW-B204  
Washington, DC 20554

RECEIVED

MAR 19 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: *In the Matter of Nondiscrimination in the Distribution of Interactive  
Television Services Over Cable*, CS Docket No. 01-7

Dear Ms. Salas:

Enclosed for filing please find an original and four (4) copies of the *Comments of SBC Communications Inc. and BellSouth Corporation* in the above-captioned matter. I have enclosed an additional copy for date-stamp and return in the self-addressed envelope provided. Thank you for your assistance in this matter.

Yours truly,



Colin S. Stretch

Enclosures

014

Before The  
Federal Communications Commission  
Washington, D.C. 20544

RECEIVED

MAR 19 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Nondiscrimination in the ) CS Docket No. 01-7  
Distribution of Interactive )  
Television Services Over Cable )

**COMMENTS OF SBC COMMUNICATIONS INC.  
AND BELL SOUTH CORPORATION**

---

Lori Fink  
Roger K. Toppins  
Paul K. Mancini  
SBC COMMUNICATIONS INC.  
1401 I Street, N.W., Suite 1100  
Washington, D.C. 20005  
(202) 326-8895  
*Counsel for SBC Communications Inc.*

Charles P. Featherstun  
Theodore R. Kingsley  
Thompson T. Rawls, II  
BELL SOUTH CORPORATION  
1155 Peachtree Street, N.E., Suite 1700  
Atlanta, GA 30309  
(404) 249-3855  
*Counsel for BellSouth Corporation*

Michael K. Kellogg  
Colin S. Stretch  
KELLOGG, HUBER, HANSEN,  
TODD & EVANS, P.L.L.C.  
Sumner Square  
1615 M Street, N.W., Suite 400  
Washington, D.C. 20036  
(202) 326-7900  
*Counsel for SBC Communications  
Inc. and BellSouth Corporation*

March 19, 2001

## TABLE OF CONTENTS

INTRODUCTION AND SUMMARY .....	1
DISCUSSION .....	4
I.    ITV SERVICES ARE “INFORMATION SERVICES” UNDER THE 1996 ACT .....	4
II.   WHERE ITV SERVICES ARE DELIVERED OVER THE CABLE PLATFORM, THE PLATFORM MAY BE COMMON CARRIAGE .....	5
III.  CABLE MAY POSSESS SUFFICIENT ITV SERVICES MARKET POWER TO BE REGULATED AS A COMMON CARRIER .....	8
IV.   ITV SERVICE IS NOT A “CABLE SERVICE” .....	10
CONCLUSION .....	14

**Before the  
Federal Communications Commission  
Washington, D.C. 20544**

In the Matter of	)	
	)	
Nondiscrimination in the	)	CS Docket No. 01-7
Distribution of Interactive	)	
Television Services Over Cable	)	

**COMMENTS OF SBC COMMUNICATIONS INC.  
AND BELL SOUTH CORPORATION**

---

**INTRODUCTION AND SUMMARY**

SBC Communications Inc. and BellSouth Corporation respectfully submit these comments in response to the Commission's January 18, 2001 Notice of Inquiry in the above-captioned matter ("*NOI*").

The *NOI* posits a wide range of questions regarding whether the Commission should regulate cable's participation in the market for interactive television ("ITV") services. The short answer to these questions is that the Commission should intervene only in the event that cable possesses transmission market power. If cable does not possess such market power, the Commission should let competition run its course, consistent with the oft-stated principle that "competition, not regulation, holds the key to stimulating further deployment" of innovative technologies.<sup>1</sup> If, however, cable does possess market power, Commission precedent requires the implementation of equal access and nondiscrimination principles to ensure that cable does not impede the growth of ITV services.

---

<sup>1</sup> *E.g.*, Second Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 15 FCC Rcd 20913, 21004, ¶ 246 (2000) ("*Second Advanced Services Report*").

At present, SBC and BellSouth take no position on whether the incumbent cable operators possess the market power that would warrant such regulation. Rather, SBC and BellSouth file these comments to explain the proper framework for characterizing ITV services under the Communications Act, and to explain how that framework would apply in the event that the Commission concludes that cable possesses market power over ITV services distribution.

The framework consists of four principal observations, each of which was articulated in detail in SBC's and BellSouth's joint comments in response to the closely related *Cable Open Access NOI*.<sup>2</sup> First, under the plain language of the 1996 Act, ITV services are "information services" subject to regulation under Title I. Second, under Commission precedent, ITV service providers that self-provide the transmission component of their service offerings may *also* be regulated as Title II common carriers. Third, Commission precedent requires that Title I/Title II result only where the service provider possesses transmission market power. Fourth, ITV services are not "cable services" under the Act, and are therefore not subject to regulation under Title VI.

Before explaining these four points in more detail, it is important to stress that the Commission's inquiry in this matter, like so many of its other inquiries, highlights the need for the Commission to formulate a coherent and uniform national broadband regulatory policy. As is obvious from the *NOI*, the proper approach to the ITV services marketplace turns to a substantial degree on whether there is sufficient competition between and among various broadband platforms – specifically, cable, DSL, fixed wireless, and satellite. That same question

---

<sup>2</sup> Notice of Inquiry, *Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities*, 15 FCC Rcd 19287 (2000); see Comments of SBC Communications Inc. and BellSouth Corporation, GN Docket No. 00-185 (FCC filed Dec. 1, 2000) ("SBC/BellSouth Open Access Comments"); Reply Comments of SBC Communications Inc. and BellSouth

is paramount in several other pending proceedings, including the *Cable Open Access NOI* as well as the *Advanced Services FNPRM*.<sup>3</sup> Indeed, the Commission has declined to regulate in several areas precisely because it viewed broadband transmission as a competitive market.<sup>4</sup> Yet even as it expressly acknowledges the presence and importance of intermodal broadband competition in some proceedings, the Commission continues to regulate one particular broadband platform provided by one particular type of company – DSL provided by incumbent LECs – as if it exists in a vacuum.<sup>5</sup> That approach fails as a matter of law and policy. As Chairman Powell recently explained, the Commission must adopt a “consistent and principled approach” to broadband regulation that “harmonize[s] regulatory treatment in a manner consistent with converged technology,” and it must do so without delay.<sup>6</sup>

---

Corporation, GN Docket No. 00-185 (FCC filed Jan. 10, 2001) (“SBC/BellSouth Open Access Reply Comments”).

<sup>3</sup> See Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 & 96-98, FCC 01-26 (rel. Jan. 19, 2001).

<sup>4</sup> See, e.g., Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, 15 FCC Rcd 11857 (2000) (“*Fixed Wireless Competition Order*”) (removing ownership limitations on fixed wireless because of intermodal broadband competition); Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, 15 FCC Rcd 9816, 9866, ¶ 116 (2000) (“*AT&T/MediaOne Order*”) (rejecting public interest concerns stemming from merger of two broadband providers in light of “actual and potential competition” in broadband market).

<sup>5</sup> See, e.g., Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912, 20941, ¶¶ 58-59 (1999) (rejecting claim that competing broadband platforms were relevant to whether ILECs should be required to provide line sharing).

<sup>6</sup> Commissioner Michael K. Powell, *The Great Digital Broadband Migration*, Remarks Before The Progress & Freedom Foundation, Washington, D.C. (Dec. 8, 2000).

## DISCUSSION

### I. ITV SERVICES ARE “INFORMATION SERVICES” UNDER THE 1996 ACT.

The 1996 Act defines an “information service” as “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(20). ITV service providers do precisely that. In the Commission’s words, they “ma[ke] available to the subscriber” a variety of “information” via a “two-way connection” that provides transmission between the user and the ITV service provider. *NOI* ¶¶ 7, 12.

Indeed, in many respects, ITV service is merely a subset of Internet access, which the Commission has already classified as an “information service.” Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11533, ¶ 68 (1998) (“*Report to Congress*”) (Internet service is an “information service” under the Act); *see NOI* ¶ 6 (like Internet service providers, ITV service providers often provide the ability “to access a chat room or email service”); Seventh Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, FCC 01-1, ¶ 41 n.126 (rel. Jan 8, 2001) (“*Seventh Video Competition Report*”) (ITV service “can include basic Internet-like functionality, such as real-time text messaging (‘chat’), and e-mail”); *AT&T/MediaOne Order*, 15 FCC Rcd at 9864, ¶ 108 (ITV services include “electronic commerce (shopping), electronic banking, video-on-demand, limited or full-service Internet access, and hyperlinking”); Ken Kerschbaumer, *Fulfilling the Promise*, *Broad. & Cable*, July 10, 2000, at 22 (ITV service offers “computer features like e-mail, personal calendars, and chat rooms”). It is therefore clear that ITV service providers are information service providers subject to regulation under Title I of the 1996 Act.

**II. WHERE ITV SERVICES ARE DELIVERED OVER THE CABLE PLATFORM, THE PLATFORM MAY BE COMMON CARRIAGE.**

It is also clear that, as SBC and BellSouth explained in detail in response to the *Cable Open Access NOI*,<sup>7</sup> where a Title I ITV service provider *self-provides* the transmission component of its service offering, it may *also* be subject to regulation as a common carrier under Title II.

Three decades ago, when the Commission set about regulating the then-fledgling “computer” industry, it determined that AT&T’s control over the local exchange provided market power over the transmission component that was considered essential to that developing industry.<sup>8</sup> Accordingly, after temporarily imposing structural separation, the Commission settled on a Title I/Title II approach that would guarantee access to that transmission. Under this regime, if a telephone company was engaged in the “computer” business, it was required to provide the transmission component that underlay its service offerings as a “basic service” – *i.e.*, as a pure transmission service subject to common carrier obligations under Title II.<sup>9</sup> At the same

---

<sup>7</sup> See SBC/BellSouth Open Access Comments at 15; SBC/BellSouth Open Access Reply Comments at 13.

<sup>8</sup> See, *e.g.*, Final Decision, *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 468, ¶¶ 219-220 (1980) (“The importance of the control of local facilities . . . cannot be overstate[d]. . . . [O]ur regulatory concerns . . . [are] directed at monopoly telephone companies exercising significant market power on a broad geographic basis.”); Report and Order, *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 F.C.C.2d 1117, 1119-20, ¶ 2, 1128, ¶ 23 (1983) (“*BOC Separation Order*”) (*Computer II* structural separation was justified by Bell company’s “control of bottleneck facilities”).

<sup>9</sup> Report and Order, *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958, 1060, ¶ 203 (1986) (“*Computer III*”) (imposing comparably efficient interconnection and open network plans in lieu of structural separation: to ensure that competition prevailed in the provision of enhanced services, “all would-be providers” of such services should be guaranteed “relatively equal costs of interconnection to the bottleneck”) (quoting DOJ comments); see also *BOC Separation Order*, 95 F.C.C.2d at



time, the Commission left non-telephone company “enhanced service” providers – *i.e.*, the service providers that relied on the BOCs for the transmission component of their computer-related services – free from regulation under Title I.

That same dichotomy is in place today under the 1996 Act, albeit with slightly different terminology. “Basic services” are now called “telecommunications services,” and “enhanced services” are now called “information services.”<sup>10</sup> But, nomenclature aside, the point is that, while most of today’s “computer” service providers – in particular, ISPs – are relatively free from regulation under Title I, when a Bell operating company uses its own transmission as part of an “information service,” it is still required to provide the underlying transmission as a common carrier “telecommunications service” subject to Title II.<sup>11</sup> That is because the Commission still views Bell operating companies as possessing narrowband transmission market power, such that common carriage status of that transmission is deemed necessary to allow competition to flourish in the information services market.<sup>12</sup> Likewise, as SBC and BellSouth

---

1120-21, ¶¶ 3-4 (extending *Computer Inquiries* framework to Bell operating companies created pursuant to MFJ).

<sup>10</sup> See First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, 21955-56, ¶¶ 102-103 (1996) (the 1996 Act’s term “information service” includes all “enhanced services”); Further Notice of Proposed Rulemaking, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 13 FCC Rcd 6040, 6066-67, ¶ 41 (1998) (proposing that the term “telecommunications service” encompass “basic services”).

<sup>11</sup> See, e.g., Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24030-31, ¶ 37 (1998) (“We note that BOCs offering information services to end users . . . are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services.”).

<sup>12</sup> See generally Memorandum Opinion and Order, *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21589, ¶ 9 (1998) (Commission precedent requires “regulatory treatment as a common

have explained, in the now exploding market for broadband Internet access, if the incumbent cable operators are thought to possess broadband market power, Commission precedent dictates that they be required to offer broadband transmission as a common carrier “telecommunications service” subject to regulation under Title II. *See* SBC/BellSouth Open Access Comments at 15-18.<sup>13</sup>

This exact same legal paradigm applies to the emerging market for ITV services. Those services – like the computer services examined in the *Computer Inquiries* and the broadband Internet access services being examined today – rely on a “two-way connection” that “is used to carry upstream requests from the subscriber, . . . and . . . to deliver [services] to the subscriber[.]” *NOI* ¶ 12. Accordingly, just as in the *Computer Inquiries* and in the *Cable Open Access NOI*, the relevant question is whether any particular platform for providing that “two-way connection” possesses market power that could thwart the growth of this vital new market. If not, then the Commission should leave the development of ITV services to the market. But if so, the

---

carrier” only where carrier “has sufficient market power” over the market for the underlying transport service); M. Kende, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbone*, at 9 (OPP Working Paper No. 32, Sept. 2000) (common carrier regulation “serve[s] to protect against anti-competitive behavior by telecommunications providers with market power”). Remarkably, the Commission also classifies ILEC DSL as common carriage, even though cable is by far the dominant provider of broadband Internet access. As SBC and BellSouth have explained, that perverse regulatory scheme cannot stand. *See, e.g.*, SBC/BellSouth Open Access Comments at 18-19.

<sup>13</sup> *See also* *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000) (“To the extent [the cable Internet service provider] is a conventional ISP, its activities are that of an information service. However, to the extent that [it] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.”); Initial Decision, *Application of Carter Mountain Transmission Corp.*, 32 F.C.C. 468, 483 (1961) (applying Title II regulation to cable, in case involving *self-provision* of carriage by a cable operator to “itself or an entity closely affiliated with itself”), *aff’d*, Decision, *Application of Carter Mountain Transmission Corp.*, 32 F.C.C. 459, 460, ¶ 2 (1962), *aff’d*, *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359, 361 (D.C. Cir. 1963).

Commission must conclude that the transmission at issue is common carriage subject to regulation under Title II.<sup>14</sup>

### **III. CABLE MAY POSSESS SUFFICIENT ITV SERVICES MARKET POWER TO BE REGULATED AS A COMMON CARRIER.**

As the *NOI* properly recognizes, the incumbent cable providers may possess exactly such market power in the market for ITV services. Indeed, cable's market power in ITV service transmission may be even more enduring – and therefore more worthy of regulation – than its position in broadband Internet access. In broadband Internet access, the cable industry possesses a dominant share of the market, and its broadband networks are far more developed than competing networks.<sup>15</sup> Yet, as the Commission appears to have recognized, alternative platforms – DSL, fixed wireless, and satellite – may provide enough “actual and potential competition” to limit cable's market power, and to remove any basis for regulating the cable platform on a common-carrier basis.<sup>16</sup>

---

<sup>14</sup> In that circumstance, the Commission would then have to determine whether the full panoply of common carrier obligations would attach, or whether instead cable operators should be considered nondominant and/or the Commission could forbear from applying certain requirements. *See* SBC/BellSouth Open Access Comments at 38-42.

<sup>15</sup> *See, e.g., Seventh Video Competition Report* ¶ 52 (cable has approximately 2.3 million broadband subscribers, to DSL's 820,000); Sanford C. Bernstein & Co. and McKinsey & Co., *Broadband!*, at 30-31 & Exhs. 22, 26 (Jan. 2000) (forecasting that by year end 2000 cable would reach 63,680,000 households, to DSL's 38,560,000); *see also Fixed Wireless Competition Order*, 15 FCC Rcd at 11870, ¶ 29 (“Forty percent to fifty percent of local lines in the National Exchange Carrier Association pools exceed three miles, at or beyond DSL's practical limit of 3.4 miles . . .”) (footnote omitted); SBC/BellSouth Open Access Comments at 5 & Attach. A; SBC/BellSouth Open Access Reply Comments at 4-5 & nn.7-12.

<sup>16</sup> *AT&T/MediaOne Order*, 15 FCC Rcd at 9866, ¶ 116; *see, e.g., Report, Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 FCC Rcd 2398, 2423-24, ¶ 48 (1999) (“[t]he preconditions for monopoly appear absent” in broadband Internet access); *Fixed Wireless Competition Order*, 15 FCC Rcd at 11864-65, ¶ 18 (discussing competition in the broadband market).

In ITV services, by contrast, the cable platform possesses significant technical advantages over competing platforms, such that cable may be the “one delivery platform” that can fully support the market. *NOI* ¶ 1; *see id.* ¶¶ 19-20 (in light of limitations on DBS’s upstream channel and DSL’s downstream channels, both may be insufficient to fully support ITV services). Moreover, cable’s enduring power in the MVPD market may prevent competing platforms from gaining access to the “specific video signal with which ITV content is to be associated,” thus preventing ITV services provided over that platform from being “precisely synchronized with the video signal.” *Id.* ¶ 26.<sup>17</sup>

In light of cable’s “significant advantages in providing ITV services,” *NOI* ¶ 20, the cable platform may possess exactly the sort of market power that demands common-carrier treatment. It is imperative, however, that the Commission move cautiously in making any such judgment. Although the cable platform is undeniably “the best suited for delivering ITV services . . . for . . . the near term,” *id.* ¶ 21, the real question is whether that “near term” advantage will lead to enduring market power.

As a general matter, “competition, not regulation, holds the key to stimulating further deployment” of innovative technologies.<sup>18</sup> Absent market failure, “[t]he Commission’s charge is to . . . avoid direct intervention.”<sup>19</sup> The Commission is within its authority to monitor the ITV

---

<sup>17</sup> Cable’s MVPD power has already given rise to equal access and nondiscrimination requirements where cable has vertically integrated into other related markets. *See, e.g.*, 47 C.F.R. § 76.1002 (content); Report and Order, *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775 (1998) (customer premises equipment). Whether ITV service providers can make use of these requirements to access “the specific video signal with which ITV content is to be associated” will be relevant to an analysis of whether cable has ITV services market power.

<sup>18</sup> *Second Advanced Services Report*, 15 FCC Rcd at 21004, ¶ 246.

<sup>19</sup> FCC Staff Report, *Broadband Today*, at 45 (Oct. 1999).

services marketplace for evidence of such failure, and it should continue to do so. But at this point in time, it is unclear whether there is sufficient evidence to warrant Commission intervention. Unless and until the Commission can determine with confidence that the cable platform has market power in the provision of ITV services, it should not interfere in the market.

#### **IV. ITV SERVICE IS NOT A “CABLE SERVICE.”**

The *NOI* asks (at ¶ 45) whether ITV services can be considered “cable services” subject to regulation under Title VI. They cannot. To qualify as a “cable service,” ITV services must involve the transmission to (1) “subscribers” of (2) “video programming” or “other programming service.” *See* 47 U.S.C. § 522(6). ITV services involve neither.

Under the Commission’s rules, a “subscriber” is “[a] member of the general public who receives broadcast programming *distributed by a cable television system.*” 47 C.F.R. § 76.5(ee) (emphasis added). Although *most* consumers that receive ITV service today get their broadcast programming over cable, some of them receive it over a different platform, such as DBS. In that latter case, where an ITV service is tied to programming received over DBS, the service obviously cannot be a “cable service,” since it is not offered to a “subscriber.” And if ITV service is not a “cable service” in that context, it is impossible to see how it would be a “cable service” in any other context. Congress could not have intended that the regulatory classification of ITV service would vary depending on whether the consumer receives video service over cable or DBS. As the Commission has said many times, the Communications Act has no place for “regulatory distinctions based purely on technology.”<sup>20</sup>

---

<sup>20</sup> *Report to Congress*, 13 FCC Rcd at 11548, ¶ 98; *see also* Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, 386, ¶ 2 (1999) (the 1996 Act is “technologically neutral”); B. Esbin, Office of Plans and Policy, FCC, *Internet Over Cable: Defining the Future in Terms of the Past*, at 96 (OPP Working Paper No. 30, Aug. 1998) (noting the “fundamental communications policy goal[]” of “competitive and technological neutrality”).

Nor can ITV service be considered “video programming” or “other programming service.” As to “video programming,” the *NOI* expressly recognizes (at ¶ 7) that ITV service is typically “supplementary” to the video programming; it therefore cannot be considered part of that same programming.<sup>21</sup> As to “other programming service,” the statute limits that phrase to “information that a cable operator makes available to *all subscribers generally*.” 47 U.S.C. § 522(14) (emphasis added). The very point of ITV service is to provide consumers with information that is *different* from that which is “available to all subscribers generally.” See *NOI* ¶ 6 (stressing that ITV service involves “subscriber-initiated” choices).

The legislative history accompanying the 1984 Cable Act – which adopted the operative terms “video programming” and “other programming service” – confirms that ITV service is not a “cable service.” That history specifically notes that Congress intended to exclude from the “cable service” definition services such as “shop-at-home and bank-at-home . . . , electronic mail, one-way and two-way transmission o[f] non-video data and information not offered to all subscribers.” H.R. Rep. No. 98-934, at 44 (1984). Those specific exclusions could have been written with ITV services in mind. ITV services involve “e-commerce and e-mail,” as well as “a service that will allow the user to access Internet content”<sup>22</sup> – *i.e.*, exactly the sort of services that Congress said were *not* “cable services.”

---

<sup>21</sup> See also *Seventh Video Competition Report* ¶ 206 & n.656 (ITV service involves “an overlay on the broadcast channel content”) (emphasis added); Ken Kerschbaumer, *Fulfilling the Promise*, Broad. & Cable, July 10, 2000, at 22 (ITV services allow consumers “to drill deeper into TV content for statistics, information on cast members, or even the means to buy products related to the programming”).

<sup>22</sup> *Seventh Video Competition Report* ¶ 206 & n.656; see also *NOI* ¶ 6 (ITV services include the ability “to access a chat room or email service to be used in conjunction with a video stream”) *AT&T MediaOne Order*, 15 FCC Rcd at 9864, ¶ 108 (ITV services include, *inter alia*, “electronic commerce” and “electronic banking”).

This analysis is unaffected by the fact that the definition of “cable service” includes “subscriber interaction . . . required for the selection or use of . . . video programming or other programming service.” See 47 U.S.C. § 522(6); see also *NOI* ¶ 45 (requesting comment on the 1996 Act’s addition of “or use”). As the statute plainly states, regardless of how much “subscriber interaction” or “use” the statute contemplates, a service may not qualify as a “cable service” unless it involves the distribution of “video programming or other programming service” to “subscribers.” 47 U.S.C. § 522(6). As discussed immediately above, ITV service involves neither.

Moreover, although certain types of ITV service involve “subscriber interaction” that can be analogized to conventional channel selection – for example, allowing the viewer to select from a menu of camera angles – permitting those examples to govern the classification of all ITV services would permit the tail to wag the dog. The fact is that most ITV services provide “basic Internet-like functionality” that just happens to be related to television shows. See, e.g., *Seventh Video Competition Report* ¶ 41 n.126. Because those “Internet-like” services must as a matter of plain language and Commission precedent be classified as “information services,” see *supra* p. 4, all ITV services should be so classified. Any other approach would necessitate service-by-service line-drawing that would consume Commission resources and deprive the marketplace of regulatory certainty.

Any other approach would also threaten to enmesh the Commission in excessive regulation of ITV service providers that would otherwise flourish under Title I. In this respect, the *Computer Inquiries* analogy discussed above applies here as well. There, as part of its initiative “to permit competitive forces, not government regulation, to drive the success” of the

computer industry,<sup>23</sup> the Commission determined that protocol processing services would be regulated under Title I “even though . . . these services perform functions similar to those of [Title II] basic service.”<sup>24</sup> Here too, ITV services should be regulated under a Title I deregulatory framework, notwithstanding the fact that some such services arguably “perform functions similar to” a Title VI cable service.

---

<sup>23</sup> J. Oxman, Office of Plans and Policy, FCC, *The FCC and the Unregulation of the Internet*, at 6 (OPP Working Paper No. 31, July 1999).

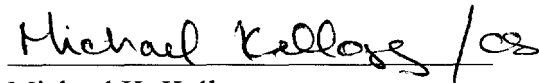
<sup>24</sup> *Computer III*, 104 F.C.C.2d at 1102, ¶ 292.



## CONCLUSION

The Communications Act and Commission precedent require the regulation of cable operators in this context only if they possess market power in the transmission of ITV services. The Commission should continue to study the ITV services marketplace to determine whether such market power exists, in which case the cable platform should be considered a "telecommunications service" subject to Title II.

Respectfully submitted,

Handwritten signature of Michael K. Kellogg in black ink, with a stylized 'K' and a slash at the end.

Michael K. Kellogg  
Colin S. Stretch  
KELLOGG, HUBER, HANSEN,  
TODD & EVANS, P.L.L.C.  
Sumner Square  
1615 M Street, N.W., Suite 400  
Washington, D.C. 20036  
(202) 326-7900  
*Counsel for SBC Communications  
Inc. and BellSouth Corporation*

Lori Fink  
Roger K. Toppins  
Paul K. Mancini  
SBC COMMUNICATIONS INC.  
1401 I Street, N.W., Suite 1100  
Washington, D.C. 20005  
(202) 326-8895  
*Counsel for SBC Communications Inc.*

Charles P. Featherstun  
Theodore R. Kingsley  
Thompson T. Rawls, II  
BELLSOUTH CORPORATION  
1155 Peachtree Street, N.E., Suite 1700  
Atlanta, GA 30309  
(404) 249-3855  
*Counsel for BellSouth Corporation*

## CERTIFICATE OF SERVICE

I hereby certify that I, Shannon Thrash, on the 19th day of March, 2001, served a copy of the *Comments of SBC Communications Inc. and BellSouth Corporation* via hand delivery to the following:

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Room TW-B204  
Washington, DC 20554

Royce Dickens  
Cable Services Bureau  
Federal Communications Commission  
445 12th Street S.W., Room 3A729  
Washington, D.C. 20554

International Transcription Service  
1231 20<sup>th</sup> Street, NW  
Washington, DC 20036

  
Shannon Thrash